Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	CC Docket No. 96-149
MCI TELECOMMUNICATIONS CORPORATION	)	
	)	
Petition for Declaratory Ruling	)	
Regarding the Joint Marketing	)	
Restriction in Section 271(e)(1) of the	)	
Communications Act of 1934, as amended	)	
by the Telecommunications Act of 1996	)	

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

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TABLE OF CONTENTS

TABLE OF CONTENTS i

INTRODUCTION AND SUMMARY 1

I. The Joint Marketing Restriction is Designed to Create Parity During the Transition to Full Competition and Ensure that Neither the BOCs Nor the Covered Interexchange Carriers Could Enjoy an Unfair Advantage from Being the First to Enter the Other's Market 4

II. MCI's Marketing Materials Violate the Joint Marketing Restriction by Prematurely Conveying the Appearance of "One Stop Shopping" 7

CONCLUSION 12

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COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. ("TW Comm"), by its attorneys, hereby submits its comments on MCI Telecommunications Corporation's ("MCI's") Petition for Declaratory Ruling in the above captioned proceeding,[1] and states as follows:

INTRODUCTION AND SUMMARY

TW Comm is a provider of local exchange telephone service and plans to offer its customers a comprehensive telecommunications services package including resold long distance service. As a nascent competitor in the integrated telecommunications services market, TW Comm does not want to see the largest interexchange carriers gain an unfair advantage over other providers of local and long distance service through prohibited joint marketing activities.

In its petition, MCI requests that the Commission explain how the rules it recently

[1]FCC Public Notice, "Pleading Cycle Established for Comments on MCI Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(E)((1) of the Act (CC Docket No. 96-149)," DA 97-1003 (rel. May 9, 1997).

adopted concerning joint marketing by certain interexchange carriers of interexchange and resold Bell Operating Company ("BOC") local exchange services would apply to MCI marketing materials.

Section 271(e)(1) of the Communications Act of 1934,[2] added by the Telecommunications Act of 1996 ("1996 Act"),[3] limits the ability of covered interexchange carriers[4] to market long distance services jointly with BOC local services purchased for resale until the earlier of the date a BOC is authorized to enter the interLATA market in a given state, or February 8, 1999. The Commission released the Non-Accounting Safeguards Order on December 24, 1996 implementing Section 271(e)(1) and clarifying the scope of the joint marketing restriction.[5] In the Order, the Commission recognized that it had not addressed all of the possible marketing strategies that a covered interexchange carrier might initiate to sell BOC resold local services and long distance services to the public, but emphasized that in enforcing Section 271(e)(1) it intends to examine the specific facts closely to ensure that covered

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[2]47 U.S.C. § 271(e)(1).

[3]Pub. L. No. 104-104, 110 Stat. 56.

[4]Section 271(e) applies to telecommunications carriers with more than 5 percent of the Nation's presubscribed access lines. In effect, the covered interexchange carriers are AT&T, MCI and Sprint. First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489, ¶ 272, n. 698 (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order" or the "Order"), petitions for recon. pending.

[5]The Order also incorporated the joint marketing restriction of Section 271(e)(1) of the Act in Part 53 of the Commission's Rules, 47 C.F.R. § 53.101(a).

interexchange carriers are not contravening the letter and spirit of the law.[6]

TW Comm believes that the Commission should construe Section 271(e)(1) in a manner consistent with the purpose of the joint marketing restriction by taking a narrow interpretation of what marketing activities a covered interexchange carrier may conduct. Congress adopted the joint marketing restriction to provide parity between the BOCs and other telecommunications carriers in their ability to provide "one-stop-shopping" for telecommunications services during the period of transition toward full competition.[7] The joint marketing restriction is of very limited duration and does not apply to marketing of an interexchange carrier's provision of local services over its own facilities, through the use of unbundled network elements, or through resold local services purchased from a local exchange carrier that is not a BOC.[8] If the Commission were to allow MCI to use the marketing materials offered as exhibits to its petition, it would render the joint marketing restriction of Section 271(e)(1) meaningless. The MCI petition provides the Commission with an excellent opportunity to make good on its promise to scrutinize specific factual examples of joint marketing, and the Commission should make clear that it will not allow covered interexchange carriers to chip away at a rule that is already of limited duration and scope.

While MCI's petition specifically addresses whether or not certain advertising materials

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[6]Non-Accounting Safeguards Order at ¶ 282.

[7]See id. at ¶ 277, n. 715 (citing S. Rep. No. 104-23 104th Cong., 1st Sess. 43 (1995)).

[8]Id. at ¶¶ 272, 276.

are permissible under the joint marketing restriction, TW Comm is concerned about other sales and marketing practices which may violate the letter and spirit of the Section 271(e) joint marketing restriction. Specifically, TW Comm is concerned about reports that certain IXCs subject to that restriction have been tying long distance service price discounts to customer commitments to purchase local service from the long distance carrier. If that local service is provided by resale of BOC local service, such tying arrangement discounts would violate Section 271(e).

I. The Joint Marketing Restriction is Designed to Create Parity During the Transition to Full Competition and Ensure that Neither the BOCs Nor the Covered Interexchange Carriers Could Enjoy an Unfair Advantage from Being the First to Enter the Other's Market

The fundamental objective of the 1996 Act is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition.[9] As stated in the Non-Accounting Safeguards Order, the 1996 Act seeks to remove legal, economic and regulatory impediments to enter telecommunications markets and allow BOCs, interexchange carriers and other firms to offer widely-recognized brand names and to increasingly offer consumers the ability "to purchase local, intraLATA, and interLATA telecommunications services, as well as wireless, information, and other services, from a single provider (i.e., 'one stop shopping'), and other advantages of vertical integration."[10] The 1996 Act allows the

[9]Id. at ¶ 20.

[10]Id. at ¶ 7 (citation omitted).

BOCs and interexchange carriers to enter each other's markets but links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the largest interexchange carriers could enjoy an advantage from being the first to enter the other's market.[11]

The 1996 Act recognizes the potential for competitive harm that can result from allowing certain carriers to offer a full range of services before others. Telephone service customers may want the option of having a single point of contact and one telephone bill for their long distance and local phone service, and this option may influence a customer's choice of carriers. The 1996 Act addresses the competitive harm that would arise if the largest interexchange carriers were to provide local phone service through resale of BOC services while BOCs are still trying to satisfy a competitive checklist in order to provide in-region long distance service in competition with those interexchange carriers. Section 271(e)(1) prohibits well-established long distance carriers from jointly marketing long distance service with BOC resold local service until the BOC is authorized to enter the long distance market. Section 272(g) of the 1996 Act creates parity by prohibiting a BOC from jointly marketing its local service with any long distance service it intends to provide in the future until it is granted authorization to provide long distance service.

In the Non-Accounting Safeguards Order, the Commission interpreted the meaning of "joint marketing" under the 1996 Act. The Order discusses those joint marketing practices that

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[11] Id. at ¶ 8.

are expressly permitted and those that are expressly forbidden. As to those practices not specifically addressed, the Commission promised that it would "examine the specific facts closely to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing by conveying the appearance of 'one stop shopping' BOC resold local services and interLATA services to potential customers."[12]

MCI's petition evidences a fundamental misunderstanding of the purpose of the joint marketing restriction. MCI lists the express constraints applicable to joint marketing by covered interexchange carriers and then argues that the category of restricted marketing undertakings should not be enlarged. To do so, according to MCI,

> would have a chilling effect on long distance carrier marketing endeavors. Deterrence of entry into local markets by any carriers, including the three interexchange carriers singled out by Section 271(e)(1), would harm consumers who, until now, have never had alternatives available to them for their local service.[13]

Section 271(e)(1) was designed precisely to place a curb on a covered interexchange carrier's marketing endeavors during a transition period toward full competition. To argue that consumers will be harmed by a lack of choice during this period if a covered interexchange carrier cannot aggressively market is disingenuous. First, covered interexchange carriers may provide local service and may market that service jointly with their long distance service. They simply may not engage in certain kinds of joint marketing when providing local service through

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[12]Id. at ¶ 282.

[13]MCI Petition for Declaratory Ruling ("Petition") at 3-4.

resale of BOC services. Second, the 1996 Act requires that consumers be given a choice of local telephone service providers. However, Congress realized that consumers may suffer in the long run without an orderly transition to competition. A fundamental objective of the 1996 Act was to move toward a marketplace where consumers could enjoy "one stop shopping" for telecommunications services,[14] yet Congress adopted the joint marketing restriction in Section 271(e)(1) to limit the ability of covered interexchange carriers to provide "one stop shopping" of certain services until the BOC is authorized to provide interLATA service in the same territory.[15]

TW Comm submits that Section 271(e)(1), a temporary regulatory restriction, serves no purpose unless the Commission gives it some teeth in enforcement. Predictably, MCI argues for a narrow reading of what marketing practices are forbidden. TW Comm believes that, subject to constitutional considerations, the Commission should take a narrow view of what practices are permitted. Otherwise, the covered interexchange carriers will enjoy an unfair and potentially long-lasting competitive advantage that will ultimately harm consumers.

II. MCI's Marketing Materials Violate the Joint Marketing Restriction by Prematurely Conveying the Appearance of "One Stop Shopping"

TW Comm believes that three of the four exhibits to MCI's petition attaching the current or potential marketing materials violate the letter and spirit of the joint marketing restriction by

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[14]Non-Accounting Safeguards Order at ¶ 7.

[15]Id. at ¶ 277.

conveying the appearance of "one stop shopping" BOC resold local services and interLATA services to potential customers.

Exhibits A and B are advertisements similar to ones currently in use or that may be used in the future, and are the subject of a complaint filed with the California Public Utilities Commission by Pacific Bell.[16] Exhibit A states that "[a]s an MCI long distance customer, you know we're committed to providing the highest levels of quality and service, 24 hours a day, 7 days a week," and promises to those current long distance customers who also sign up for resold local service, joint customer care -- "one call to one company for customer service" and "one easy-to-read monthly statement for both your local and long distance calls."[17] Exhibit B similarly promises to existing MCI long distance customers "One company ... one bill ... one call."[18]

Exhibits A and B violate the joint marketing restriction by conveying to MCI long distance customers the appearance of "one stop shopping" for long distance and BOC resold local service. In the Non-Accounting Safeguards Order, the Commission concluded that a covered interexchange carrier may not mislead the public by stating or implying that it can provide "one-stop shopping" of interLATA service and BOC resold local service. Exhibits A and B are misleading in just that respect.

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[16]Petition at 7.

[17]Id. at 7-8, Exhibit A.

[18]Id. at 8, Exhibit B.

MCI defends Exhibits A and B by arguing that those two advertisements were sent only to MCI long distance customers and that, "[a]s MCI had already successfully sold those customers long distance service, the mailers could not constitute prohibited joint marketing in any event."[19] In making this argument, MCI has misinterpreted the Commission's direction as to permissible "post-marketing activities."[20] The Order states that:

> Because we interpret section 271(e) to apply only to activities that take place prior to a customer's decision to subscribe, we conclude that, once a customer subscribes to both local exchange and interLATA services from a carrier that is subject to the restrictions of 271(e), that carrier may market new service to an existing subscriber.[21]

Exhibits A and B are aimed at MCI long distance customers prior to their decision to subscribe to MCI's resold local service, in an attempt to induce them to subscribe to that resold local service. Exhibits A and B are not advertisements for new services to existing subscribers who have already subscribed to both local exchange and interLATA services from MCI. Because MCI has signed up the target of the advertisement to its long distance service, but not to its local resale service, it has not engaged in a permissible "post-marketing activity" under the test quoted above.

MCI further defends Exhibits A and B by arguing that the Order "specifically permitted

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[19]Id. at 7.

[20]Non-Accounting Safeguards Order at ¶ 281.

[21]Id. (emphasis added).

such advertising of joint customer care."[22] Again, MCI has misinterpreted the Commission's directions in the Order:

> after a potential customer subscribes to both interLATA and BOC resold local services from a covered interexchange carrier, that carrier should be permitted to provide joint "customer care" . . .[23]

The Order specifically permitted a covered interexchange carrier to "provide" -- not "advertise" -- joint customer care, and only after a potential customer has subscribed to both long distance and BOC resold local service from that carrier.[24] This is an important distinction because joint customer care may strongly influence a potential customer's decision to subscribe to MCI's local service. Being allowed to advertise joint customer care prior to subscription would thus give a covered interexchange carrier an unfair advantage over other providers of local and long distance service in contravention of the purpose of the joint marketing restriction. Moreover, MCI's use of joint customer care as a promotional tool is misleading as to what services a potential customer may obtain with "one call." It would be difficult for MCI to claim that the above "post-marketing" defenses were unwitting misinterpretations when MCI accurately set forth the directions of the Order in its petition.[25]

The advertisements that comprise Exhibit C to MCI's petition (collectively referred to

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[22]Petition at 8.

[23]Non-Accounting Safeguards Order at ¶ 281 (emphasis added).

[24]Id.

[25]Petition at 4.

hereafter as "Exhibit C") are unlawful for the same reasons as Exhibits A and B. Exhibit C is essentially the same promotional mailing to current MCI long distance customers as Exhibit B, with slight variations depending on whether the local service being solicited is for business or home customers. Exhibit C again makes use of the misleading slogan: "One company. One Bill. One Call."[26]

TW Comm believes that the advertisements that comprise Exhibit D to MCI's petition (collectively referred to as "Exhibit D") are lawful examples of joint marketing. Exhibit D begins by introducing MCI as the company that provides "savings and convenience" to long distance customers, and then describes the local service being offered.[27] Unlike Exhibits A - C however, Exhibit D does not otherwise tie the local service to MCI's long distance service, and is not misleading. The Commission interpreted Section 271(e)(1) as allowing a covered interexchange carrier to advertise the availability of interLATA services and BOC resold local services in a single advertisement, but prohibited such a carrier from misleading the public as to whether it could provide "one stop shopping" for both services through a single transaction.[28] TW Comm believes that Exhibit D adequately complies with the joint marketing restriction.

Finally, while MCI seeks a declaratory ruling specifically as to the marketing materials

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[26]Id. at Exhibit C.

[27]Id. at Exhibit D.

[28]Non-Accounting Safeguards Order at ¶ 280.

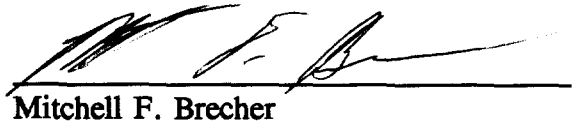
attached as exhibits to its petition, TW Comm's concerns about violation of the joint marketing restriction go beyond advertising copy. For example, upon information and belief, MCI has offered selective long distance discounts tied to customers' signing up for MCI local service. If this practice includes BOC resold local service, such "tying" of long distance discounts to local service purchase would violate the joint marketing restriction and would also be an "unreasonable discrimination" in violation of Section 202(a) of the Communications Act.

CONCLUSION

For the reasons discussed in these comments, TW Comm urges the Commission to issue a declaratory ruling regarding the joint marketing restriction of Section 271(e)(1) of the Communications Act that is consistent with the positions articulated in these comments.

Respectfully submitted,

TIME WARNER COMMUNICATIONS HOLDINGS, INC.



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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "*Comments of Time Warner Communications Holdings, Inc.*" in Docket No. 96-149, was served this 9th day of June, 1997, upon the following:

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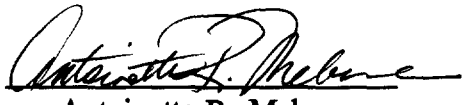

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